A

PP

v.

KARIM AB JABAR

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
SULONG MATJERAIE JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: P-05-7-2002]

C

24 MARCH 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 10.384 kg cannabis - Acquittal without calling defence - Whether learned judge failed to draw inference that mens rea possession*

D *was prima facie established*

This was the prosecution's appeal against the order of the learned judge acquitting the respondent without calling upon his defence on a charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The respondent was found driving a car with a total of 10.384

E kilograms of cannabis. The prosecution submitted that the following circumstances when taken together established a *prima facie* case against the respondent: (i) the finding of the drugs on the front passenger seat and in the trunk of the car in question;

F and (ii) the proximity of the respondent to the drugs at the front passenger seat was a fact relevant to establish actual physical possession.

Held (setting aside order of acquittal by learned judge and ordering a re-trial)

G **Per Gopal Sri Ram JCA delivering the judgment of the court:**

(1) The learned judge having accepted the prosecution's evidence as to the finding of the drugs, the identification of the police

H officers and the scuffle, failed to direct himself as to the proximity of the drugs to the respondent. There was the added circumstance that the respondent was driving the car from one point to another with the drugs in it. As such, the respondent was found conveying the drugs. Further, the

I quantity of the drugs discovered was far in excess of that he would require for his personal use, if any. The irresistible

inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the purpose of trafficking in it. (paras 6 & 8)

(2) The burden on the prosecution was to establish the "*mens rea* possession" on the part of the respondent. Not only must the prosecution prove the *factum* of physical possession but also the knowledge of the respondent as to the nature and quality of the drug possessed. The mental element in a crime must, in the absence of an admission by the respondent be established through circumstantial evidence from which admissible inferences might be drawn. On the totality of the evidence adduced by the prosecution, it was incumbent upon the learned judge to draw the inference that the element of *mens rea* possession had been *prima facie* established. The learned judge was plainly wrong in failing to do so. (paras 11 & 12)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan pendakwaan terhadap perintah yang arif hakim yang membebaskan responden tanpa memanggilnya untuk membela diri atas pertuduhan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Responden didapati memandu kereta di mana terdapat di dalamnya sejumlah 10.384 kilogram kanabis. Pendakwaan berhujah bahawa halkeadaan-halkeadaan berikut, dilihat secara bersesama, telah membangkitkan kes *prima facie* terhadap responden, iaitu: (i) penemuan dadah di atas tempat duduk penumpang hadapan dan di dalam but kereta berkenaan; dan (ii) kehampiran responden kepada dadah yang dijumpai di tempat duduk penumpang hadapan adalah fakta relevan untuk membuktikan milikan fizikal sebenar.

Diputuskan (mengenepikan perintah pembebasan yang arif hakim dan memerintahkan perbicaraan semula)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim, setelah menerima keterangan pendakwaan mengenai penemuan dadah, identiti pegawai-pegawai polis dan pergelutan, gagal mengarahkan dirinya berhubung kehampiran dadah kepada responden. Terdapat juga satu halkeadaan tambahan lain, iaitu bahawa responden telah memandu kereta tersebut dari satu tempat ke satu tempat dengan membawa

A dadah di dalamnya. Oleh itu, responden telah mengangkut dadah di dalam kereta berkenaan. Selain itu, kuantiti dadah yang ditemui jauh melebihi jumlah yang diperlukan untuk kegunaan sendiri, jikapun keperluan tersebut wujud. Inferens yang sepatutnya dirumus oleh yang arif hakim dari keseluruhan
B keterangan adalah bahawa responden telah mengangkut dadah bagi maksud untuk mengedarkannya.

(2) Beban atas pendakwaan adalah untuk membuktikan '*mens rea* milikan" di pihak responden. Pendakwaan bukan sahaja perlu
C membuktikan *factum* milikan fizikal tetapi juga pengetahuan responden mengenai sifat dan kualiti dadah yang dimiliki. Dalam ketiadaan pengakuan oleh responden, elemen mental dalam perlakuan jenayah harus dibuktikan melalui keterangan ikut keadaan dari mana inferens-inferens boleh diterima-masuk
D boleh dibuat. Berdasarkan keseluruhan keterangan yang dikemukakan oleh pendakwaan, menjadi tanggungjawab yang arif hakim untuk menyimpulkan inferens bahawa elemen *mens rea* milikan telah *prima facie* dibuktikan. Yang arif hakim khilaf bilamana gagal berbuat demikian.

E **Case(s) referred to:**
Chan Chwen Kong v. PP [1962] 1 LNS 22 HC ***(refd)***
Lim Hock Boon v. PP [2007] 4 CLJ 114 CA ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Foo Jua Eng [1965] 1 LNS 137 HC ***(refd)***

F **Legislation referred to:**
Dangerous Drugs Act 1952, s. 39B(1)(a)

For the accused - RN Rayer; M/s R Nethaji Rayer & Co
For the prosecution - Mangaiarkarasi Krishnan DPP

G *[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-7-98]*

Reported by Usha Thiagarajah

H **JUDGMENT**

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

I **[2]** The respondent before us was charged for offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). He was acquitted at the close of prosecution's case. The Public Prosecutor being dissatisfied with that result has appealed to us.

[3] The brief facts relevant to this appeal are these. On 22 April 1997 at about 4pm, PW3 (DSP Ramli) accompanied by 11 police officers conducted a surveillance in the area surrounding EON, Bulat Dumbar and Lengkok Dumbar in Penang. There was a bus stop at Bukit Dumbar. PW4 (Insp. Raja Hafiz) and his team of officers placed themselves at that bus stop. A short while later PW4 saw a BMW motorcar registration number PDJ 31 travelling towards him. After communicating with PW3, PW4 and his team stopped the car. There is no dispute that the respondent was driving the car. There is also no dispute – indeed the judge accepted it as a fact – that the police officers had identified themselves as such to the respondent. It is also not disputed that a scuffle took place following which the respondent was placed under arrest. The police recovered a red plastic package (exh. P7) from the front passenger seat of the motorcar. Inside it were found three compressed slabs which PW3 suspected to be cannabis. The boot of the car was also searched. From it was recovered a small white package containing five compressed slabs and a small red plastic package containing two newspaper packages. From one of these packages, were recovered two compressed slabs and from the other, one compressed slab. Upon subsequent examination by the chemist, it was found that all these slabs contained a total of 10.384 kilograms of cannabis, a drug proscribed by the Act.

[4] Before us it was argued by the learned deputy that the High Court had misdirected itself in acquitting the respondent without calling upon his defence. Our attention was drawn to the following circumstances which, according to the learned deputy, when taken together established a *prima facie* case against the respondent. In the first place there is the finding of the exhibit on the front passenger seat and in the trunk of the car. The proximity of the respondent to the drugs at the front passenger seat is a fact relevant to establish actual physical possession.

[5] In *Public Prosecutor v. Foo Jua Eng* [1965] 1 LNS 137, the accused was charged with assisting in carrying on a public lottery. The evidence showed that the accused had been found by the police in a room, seated about three feet away from a dressing table on which the relevant exhibits were found. The magistrate acquitted the accused. The prosecution appealed. In allowing the appeal, Raja Azlan Shah J (as His Royal Highness then was) said this:

A With regard to the mental element, the learned magistrate rightly directed his mind that knowledge or consciousness would depend on the surrounding circumstances. However, he failed to direct his mind adequately on the facts. He directed his mind to the circumstances when the respondent tried to close the door on
B PW1. But he failed to consider the other circumstance which, taken together, may well be that the element of possession was proved. That circumstance is the physical proximity of the respondent to the exhibit in question.

[6] So too here. The learned judge having accepted the
C prosecution's evidence as to the finding of the drugs, the identification of the police officers and the scuffle, failed to direct himself as to the proximity of the drugs to the respondent. Indeed no where in his judgment, did the learned trial judge address his mind to this fact. There is the added circumstance that
D the respondent was driving the car from one point to another with the proscribed drugs in it.

[7] To the foregoing cumulative facts may be applied the following observation of Lord Diplock in *Ong Ah Chuan v. PP* [1980] 1 LNS 181:
E

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express
F admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, *in the absence of any plausible explanation by him*, be irresistible – even
G if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

[8] In the present appeal the respondent was found conveying
H the proscribed drugs in the motorcar in question. The quantity of the drugs discovered was far in excess of that he would require for his personal use, if any. The irresistible inference that the learned trial judge ought to have drawn from the totality of evidence was that the respondent was conveying the drugs for the
I purpose of trafficking in it. Unfortunately, the learned trial judge in the court below did not direct his mind along these lines.

[9] In opposing this appeal, learned counsel for the respondent has drawn our attention to two matters which he submits constitute a complete answer to the prosecution's case. The first point concerns the statement recorded by the police from the owner of the motorcar in question. The owner could not be found despite the best efforts of the police. Hence his statement was put in. In it the owner provides two answers which the respondent's counsel contends are favourable to the defence. In his first answer the owner says that the respondent took the car keys and drove the car away as he was entitled to do. He thought or believed that the respondent was taking the car to be shown to a prospective buyer. In the second answer, he concedes that he has a second key to the car in his office. With respect, we do not find these answers of any assistance to the respondent. For, they do not in any way explain the presence of the drugs on the passenger seat or in the trunk of the car.

[10] The second point made by the learned counsel for respondent is this: each individual circumstance relied upon by the prosecution in this case is entirely neutral. That might well be true. However the essence of circumstantial evidence is not the effect of the individual strands of evidence but the combined effect of all the circumstances when taken together. In this context, we need do no more than to quote the following passage of Thompson CJ in *Chan Chwen Kong v Public Prosecutor* [1962] 1 LNS 22:

> In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[11] We have not overlooked the fact that the prosecution in this case does not seek to rely on any presumptions to establish the charge against the respondent. The burden on the prosecution is therefore to establish what the cases have described as "*mens rea*

possession" on the part of the respondent. In other words, not only must the prosecution prove the *factum* of physical possession but also the knowledge of respondent as to the nature and quality of drug possessed. See *Lim Hock Boon v. PP* [2007] 4 CLJ 114 and the cases discussed therein. The mental element in a crime must, in the absence of an admission by the respondent, be established through circumstantial evidence from which admissible inferences may be drawn.

[12] On the totality of the evidence adduced by the prosecution in this case, it was incumbent upon the learned judge in the court below to draw the inference that the element of *mens rea* possession had been *prima facie* established. It was then for the respondent to give an explanation to rebut that inference. The learned judge was plainly wrong in failing to do so. As such we have no alternative but to intervene.

[13] For the reasons given, this appeal will be allowed. The order of acquittal by the High Court is set aside. The learned judge who tried this case has since retired. Having regard to all the circumstances of this case, we regard the just and proper order to make is to direct a re-trial. We do so.

[14] The accused shall be remanded in custody until the conclusion of the re-trial. We direct the respondent to be produced before the judge in open court in Penang on 25 March 2008 at 9am for trial dates to be fixed. Priority must be given to this case.